Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

DELAWARE COUNTY HOUSING AUTHORITY,
Petitioner,

v.

BARBARA BISHOP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A number of state courts and one federal court of appeals have addressed the issues presented in this case and reached conflicting conclusions. Those issues are:

1. Whether a public housing authority may evict an "innocent" tenant based solely on the criminal activities of family members living with that tenant and regardless of whether that tenant had control over those family members or knew of their criminal activities, when the lease, in language required by the Affordable Housing Act, 42 U.S.C. §1437d(1)(6), and the Regulations promulgated under that Act, authorizes that result?

2. Whether, under this Court's decision in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), the lower court should have deferred to HUD's explicit finding that under the Affordable Housing Act, 42 U.S.C. §1437d(1)(6), a "tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit?"

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Delaware County Housing Authority hereby petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Commonwealth Court of Pennsylvania entered in this case on February 28, 2000.

I. OPINIONS OF THE COURTS BELOW

The opinion of the Commonwealth Court of Pennsylvania of which the petitioner seeks review is reproduced at App. 3a and is reported at 749 A.2d 997 (2000). The opinion and order of the trial court, the Court of Common Pleas of Delaware County, is reproduced at App. 17a.

II. STATUTORY PROVISION INVOLVED

Each public housing authority shall utilize leases which –

> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. §1437d(l)(5)(1991) (redesignated 42 U.S.C. §1437d(l)(6)(1996)).

III. JURISDICTION

This is an appeal from a judgment of the Commonwealth Court of Pennsylvania, an intermediate Pennsylvania appellate court, which was entered on February 28, 2000. App. 3a. Petitioner filed a timely Petition for Allowance of Appeal seeking discretionary review by the Pennsylvania Supreme Court. That Petition was denied by Order entered on November 3, 2000. App. 1a.

The decision of the Commonwealth Court was based solely on its erroneous interpretation of a federal statute, 42 U.S.C. §1437d(1)(5), and the regulations promulgated thereunder. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. §1257 (a).

IV. STATEMENT OF THE CASE

As of January 1, 1994, Respondent Barbara Bishop ("Bishop") entered into a month-to-month lease agreement with the Delaware County Housing Authority (the "Authority"). The lease listed Bishop as head of the household, and her two adult sons, Nathaniel Bishop and Ralph Lamont Walters, as occupants of her residence. In the lease, Bishop promised:

> [n]ot to engage in criminal activity, including drug-related criminal activity, on or near the public housing Premises, and to have Tenant's guests, any family member or other person under Tenant's control refrain from such activity.

In July 1995, Bishop permitted her son Nathaniel to resume residence in her apartment knowing that he had just

been released from several months of incarceration for a probation violation related to an earlier criminal offense. Early in the morning of Friday, September 22, 1995, Nathaniel broke into the home of Mildred Venables, a sixty-eight year old woman residing in the same public housing complex, and proceeded to rape and rob her. Nathaniel was later convicted of rape, robbery, burglary, and unlawful restraint and sentenced to ten to twenty years in prison.

On October 5, 1995, after a showing of probable cause that criminal activity was occurring in Bishop's apartment, police executed a search warrant there and found cocaine and marijuana on the premises, which Bishop's son Ralph Walters claimed belonged to him. For this offense, Ralph Walters was placed on six months probation and admitted into Delaware County's Accelerated Rehabilitative Disposition Program.

In the Fall of 1995, the Upland Borough Police Department notified the Authority that Bishop had allowed her sons Ralph and Nathaniel to engage in criminal activity on Housing Authority premises. As a result of this notification and pursuant to Section 7L of the lease, the Authority sent Bishop Notices of Lease Termination on October 12, 1995 and October 30, 1995 as a result of Nathaniel Bishop's criminal activity, and on November 14, 1995 as a result of Ralph Winters' possession of narcotics.

The Authority then filed an action in ejectment in the Upland District Court, which entered judgment in favor of the Authority. Bishop appealed to the Court of Common Pleas of Delaware County; after arbitration and an award in the matter entered in Bishop's favor, the Authority filed an appeal de novo. At a non-jury trial, Bishop claimed that she did not have actual knowledge of the criminal activity of her sons. On this basis, and because he concluded that she could not have prevented the criminal activity, Judge Clement J.

McGovern, Jr. entered judgment in favor of Bishop and denied the Authority's post-trial motions.

The Authority appealed to the Commonwealth Court, which issued an Order and Opinion dated February 28, 2000, affirming the trial court's denial of the Authority's request for eviction. The Authority filed an application for reargument in the Commonwealth Court and, by Order, dated May 8, 2000, the Commonwealth Court denied the application. App. at 2a.

On November 3, 2000, the Pennsylvania Supreme Court denied the Authority's timely Petition for Allowance of Appeal without opinion. App. 1a.

IV. REASONS FOR GRANTING THE WRIT

A number of state appellate courts and one federal court of appeals have addressed the issue of whether the relevant federal law permits a public housing authority to evict an "innocent" tenant based solely on the criminal activity of a family member or guest. To date, there is a direct, irreconcilable conflict between those courts.

In this case, the Pennsylvania Commonwealth Court ruled that Petitioner could not evict a tenant based solely on the criminal conduct of family members. In so doing, the Commonwealth Court ignored the clear language of the statute and substituted its judgment as to the meaning of a federal statute for that of the Department of Housing and Urban Development ("HUD"), the agency charged with enforcing the statute. The Commonwealth Court also put itself in conflict with the vast majority of state appellate courts which have considered the issue.

Because of this conflict, and because the federal statute at issue is a critical part of the fabric of laws and regulations woven by Congress and HUD to address the overwhelming problem of crime and drugs in public housing

facilities across America, this Court should issue a writ of certiorari. The Court should then find, consistent with the explicit finding of HUD and the plain terms of the statute as enacted by Congress, that under the statute, a "tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." 56 Fed. Reg. 51567.

A. There is a Conflict Between the Various State Courts and the Single Federal Court of Appeals Which Have Considered the Important Federal Issue Raised in This Case.

1. The Legislation and Regulations At Issue in this Case Are a Critical Part of the War Against Crime and Drugs in Public Housing Facilities.

In 1988, faced with a devastating and worsening epidemic of drug related crime and violence in public housing, Congress took decisive steps toward improving living conditions in public housing. Beginning with the observations that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," 42 U.S.C. § 11901(1)-(2), Congress created an effective and efficient mechanism for ridding public housing of those who sell or use drugs, or commit other crimes.

Using unmistakably clear statutory language, based on reasonable findings that such legislation was necessary[1], Congress provided that criminal activity by a public housing tenant or a member of the tenant's household would be a sufficient ground for eviction. Specifically, Congress required all local housing authorities to use leases which:

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

42 U.S.C. §1437d(l)(5) (1989).

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[1] Congress made three other related findings:

> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures;
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities... . Id. § 11901(3)-(5).

Two years later, as part of the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625 §504, 104 Stat. 4079, 4185 (1990), Congress clarified and tightened this requirement, mandating that all leases:

> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. §1437d (1991).[2]

In response to Congress' mandate, HUD promulgated regulations that implemented this statutory prohibition against criminal activity. Housing and Urban Development: Lease Requirements, 24 C.F.R. § 966.4 (1)(2)(ii) (1993), 56 Fed. Reg. 51,560, 51,578 (1991). In developing these rules, HUD recognized Congress' concerns about drug-related crimes and the threat they posed to public housing residents and communities. HUD concluded:

> The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and

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[2] In 1996, after the incidents at issue in this case, Congress replaced the phrase "on or near such premises" with "on or off such premises. " Id. (1997). In 1998, the section was redesignated as subsection (l)(6). Id. (1999).

> general benefit of public housing residents warranting special mention in the law. (U.S. H. Act, § 6(1)(5), 42 U.S.C. § 1437(d)(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy *without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated violation or other good cause for eviction.*

56 Fed. Reg. 51,566-51,567 (Oct. 11, 1991)(emphasis added).

Like the controlling statute, the implementing regulations require local housing authorities to secure leases from each of their tenants in which the tenant explicitly promises:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> > (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's [Public Housing Authority's] public housing premises by other residents or employees of the PHA, or
> >
> > (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. §966.4(f)(12)(I).

In formulating these regulations, HUD considered comment by legal aid and by tenant organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household" and "that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant did everything 'reasonable' to control the criminal activity." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Ultimately, HUD decided not to accept these suggestions. Instead, following the statute as enacted, which contained no such caveat, HUD stated quite explicitly:

> The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Id. at 51567.[3]

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[3] While the regulation clearly grants PHAs the power to evict the "innocent tenant" because of the acts of others, it also allows, but *does not require*, the exercise of discretion in the exercise of that power:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of

(continued...)

2. Courts Interpreting the Statute and the Regulations Have Reached Conflicting Results.

In this case, the Commonwealth Court of Pennsylvania held that:

> because Bishop had no knowledge of her sons' criminal conduct, because her sons were not under her control, and because Bishop reasonably could not have foreseen her sons' criminal conduct, Bishop's eviction would be contrary to Congress' intent in enacting 42 U.S.C. §1437d(1)(5).

App. at 15a. The only federal court of appeals to consider the issue agreed with the Commonwealth Court in this case that "Congress did not intend §1437d(l)(6) to permit the

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[3](...continued)

> participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

24 C.F.R. §966.4(1)(5)(I).

eviction of innocent tenants." Rucker v. Davis, 2001 U.S. LEXIS 904 (9th Cir. Jan 24, 2001)(en banc).

On the other hand, the only state supreme court to address the issue disagreed, holding that, in light of the terms of the federal statute, HUD's regulations, and the federally-mandated terms of the tenant's lease, a tenant could be evicted because of her son's conviction in a drive-by shooting of a neighboring residence even though she "did not have any knowledge of her son's criminal activities or reason to anticipate her son's acts." Minneapolis Public Housing Authority v. Lor, 591 N.W.2d 700, 702-03 (Minn.1999).

The various other state appellate courts which have considered the issue have split. Most have agreed with the Supreme Court of Minnesota that the statute and the regulations permit the eviction of an "innocent tenant" based solely on the criminal activities of family members or guests. See Ann Arbor Housing Commission v. Wells, 240 Mich. App. 610, 616-618, 618 N.W.2d 43 (Mich. Ct. App. 2000) ("The express statutory language evinces a clear congressional intent to authorize termination of a tenancy regardless of whether the tenant was aware that his household member or guest was selling, manufacturing, distributing, or using drugs."); Memphis Housing Authority v. Thompson, 1999 Tenn. App. LEXIS 506 (Tenn. Ct. of App. July 29, 1999) (appeal pending) (affirming summary judgment for the housing authority, finding both statute and lease language clear and unambiguous); Barajas v. Housing Authority of Harlingen, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (affirming award of summary judgment to PHA based on the plain terms of the federally-mandated lease language); Syracuse Hous. Auth. v. Boule, 172 Misc. 2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), aff'd, 177 Misc. 2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), rev'd, 265 A.D.2d 832, 701 N.Y.S.2d 541

(N.Y.App.Div. 4th Dep't 1999) (finding that eviction without proof of knowledge of criminal activity was consistent with statute, HUD regulation and HUD "One Strike and You're Out" policy); Housing Authority of New Orleans v. Green, 657 So.2d 552 (La. App. 4th Cir. 1995), app. denied, 661 So.2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996) (language of statute does not imply that tenant must have knowledge about drug activity as precondition to eviction); Minneapolis Public Housing Authority v. Holloway, CO-95-391, 1995 Minn. App. LEXIS 1028 (Minn. Ct. App. Aug. 15, 1995) ("the eviction standard for public housing does not ask whether the tenant could 'reasonably foresee, prevent, or control' the incidents that caused the eviction... . The tenant is responsible for the acts of family and guests. 24 C.F.R. §966.4(1)(2)(I)(1993)... ."); South San Francisco Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 19, 49 Cal. Rptr. 2d 367, 371 (1995) (by requiring that each public housing lease contain language setting forth that drug-related activity by any member of a tenant's household is cause for eviction, Congress provided "straightforward practical method" for eviction based on strict liability). Cf. Chavez v. Housing Authority of the City of El Paso, 1991 WL 424554 *5 (W.D. Tex.), aff'd, 973 F.2d 1245 (5th Cir. 1992) (finding no constitutional violation in the eviction of tenant whose son engaged in criminal activities). However, one state appellate court reached same conclusion as the Commonwealth Court in this case. Charlotte Housing Auth. v. Patterson, 464 S.E.2d 68 (N.C. App. 1995) (turning on lack or personal fault, control and foreseeability).

The basis for the conflict is well illustrated by the majority and dissenting opinions in Rucker, decided en banc on January 23, 2001. In Rucker, four public housing tenants filed suit in federal court under the Administrative

Procedures Act, 5 U.S.C. §§ 701-706, seeking to enjoin eviction actions which were pending against them in state court. Each eviction action was based on the criminal activities of others of which the tenant had no knowledge.

The district court entered the requested injunction. On appeal, the original panel reversed. Rucker v. Davis, 203 F.3d 627 (9th Cir. 2000), rehearing en banc granted at 222 F.3d 614 (9th Cir. 2000).

After rehearing before the court en banc, the Ninth Circuit affirmed the district court. The majority found:

> [t]he statutory provision does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted. ...When [Section 1437d(1)(6) is] read in conjunction with the remainder of §1437d(1) and other provisions enacted at the same time, however, it appears that Congress did not intend subsection (6) to apply to eviction of innocent tenants.

Rucker v. Davis, 2001 U.S. LEXIS 904 at *16, *26 (9th Cir. Jan 24, 2001)(en banc). Purporting to find further support for that conclusion in the legislative history, the Rucker majority rejected HUD's interpretation of the statute on the ground that it was clearly contrary to Congress' intent. Id. at *14. The majority also found that permitting the eviction of innocent tenants would be "unreasonable" and "absurd." Id. at *29-32.

On the other hand, the dissenters in Rucker [4] agreed with the vast majority of the state courts which have considered the issue that "[b]ecause the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute." Id. at *45. Finding that the majority had failed to support its conclusion that "Congress had an intention on the precise question at issue that is contrary to HUD's construction" because the legislative history utilized by the majority was ambiguous, the dissenters noted that "'[i]t is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations.' Rust v. Sullivan, 500 U.S. 173, 189-190 (1991)." Id. at *46. See also Minneapolis Public Housing Authority v. Lor, supra at 703, n.15 (Minn. 1999). After analyzing the statute at length and concluding that it was not ambiguous, the dissenters concluded:

> It is obvious that when Congress authorized the eviction of innocent tenants, the potential for individual unfairness existed. Congress granted to local PHA's the power to evict and trusted that the "humane judgment" of PHA officials and the procedural protections of the Act would prevent the abuse of this power. Congress struck a balance. It did so in the face of a drug crisis and the ineffectiveness of traditional law enforcement. It bestowed upon the PHAs the authority challenged in this case. That authority does not violate the

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[4] Judge Sneed authored the dissenting opinion which Judges Fernandez, Nelson and Silverman joined.

> Constitution. This legislation should be interpreted as it was written.

Id. at *92.

The state court decisions have split along similar lines. Compare, e.g., Minneapolis Public Housing Authority v. Lor, supra, and Syracuse Hous. Auth. v. Boule, supra, to Charlotte Housing Auth. v. Patterson, supra, and Delaware County Housing Authority v. Bishop, 749 A.2d 997 (Pa. Comm. Ct. 2000). Clearly, there is a conflict which this Court needs to resolve.

B. The Lower Court Ignored Both the Language of the Statute and a Definitive Interpretation of Federal Law Rendered by the Federal Agency Charged With Enforcement of That Law.

Consistent with the relevant section of the United States Housing Act,[5] Bishop's lease states that tenants are obliged:

> Not to engage in criminal activity, including drug-related criminal activity, on or near the public housing Premises and to have the Tenant's guests, any family member or other such person under the Tenant's control refrain from such activity.

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[5] At the time relevant to this case, the relevant section was §1437d(1)(5). That section was subsequently redesignated as §1437d(1)(6).

App. at 5a. The Commonwealth Court found this language, and the relevant statutory language, to be vague with regard to the issue of control:

> we cannot discern whether the phrase "under the Tenant's control" in section 7L of Bishop's lease modifies only the term "other person," or whether the phrase "under the Tenant's control" also modifies "guests" and/or "any family member. . . ."

App. at 11a . Accordingly, it felt compelled to look at the legislative history, where it found what it determined to be a clearly expressed legislative intent that tenants not be held strictly liable for criminal acts committed without the tenant's knowledge by family members who are not under the tenant's control.

In so doing, the court ignored the clear language of the statute and the interpretation of the statute rendered by HUD, the agency charged with enforcing the statute. HUD has promulgated regulations which make clear its view that the statute does permit the eviction of so-called "innocent" tenants, a view dictated by the terms of the statute as enacted. In fact, in promulgating those regulations, HUD rejected comments which suggested that was not the proper interpretation of the statute, stating that:

> The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

56 Fed. Reg. 51567.

HUD offered several reasons for its decision. First, the "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." Id. at 51567. Second, HUD recognized that allowing a tenant to escape eviction by claiming a lack of knowledge "would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members" and "would thereby undercut the tenant's motivation to prevent criminal activity by household members." Id. Third, PHAs may often have difficulty proving in court that the leaseholder had knowledge or control over the offending person, thus making it time-consuming, costly, and otherwise cumbersome to evict households causing drug-related problems in public housing. Id. Finally, HUD noted that "a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." Id.

This Court has repeatedly held that where the agency charged with enforcing a statute has rendered its interpretation of that statute, and that interpretation is a "permissible construction of the statute," courts may not substitute their own judgment for that of the agency. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Here, HUD has rendered such a "permissible construction of the statute" and the lower court erred in not deferring to that interpretation.

As the dissenters noted in Rucker:

> Because the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute.

Id. at *45. See also Housing Auth. of New Orleans v. Green, 657 So. 2d 552, 554 (La. Ct. App.), app. denied, 661 So. 2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996) ("That a Congressional committee may not have intended for tenant evictions to take place in the absence of knowledge, does not change the fact that when the Congress as a whole enacted [the 1990 amendments to the Housing Act] it did so without the imposition of a knowledge requirement.").

With regard to the issue of control, on which the lower court in this case found the statute to be ambiguous, the Rucker dissenters found that:

> Under § 1437d(l)(6) there are four categories of individuals whose drug related criminal activity on or near public housing property will result in the tenant's eviction. First, the tenant is responsible for his or her own drug use. Second, criminal drug activity by the tenant's household members is cause for termination. Third, the tenant's guests may not engage in criminal drug activity. Fourth, criminal drug activity by other persons under the tenant's control is also cause for eviction.
>
> The structure of the statute suggests that tenants, household members, and guests are per se under the tenant's control and,

> therefore, the drug related criminal activity of anyone in one of these categories is cause for eviction. The tenant exercises "control" over these individuals when he or she permits them to reside in or visit the premises. No additional level of "control" is necessary.

Id. at *48-49. See also Ann Arbor Housing Commission v. Wells, 240 Mich. App. 610, 616, 618 N.W.2d 43, (Mich. Ct. App. 2000). They went on to dissect the majority's analysis:

> The majority points out that the statute is silent on the question of a tenant's required knowledge. This alters the relevant inquiry only slightly. The majority must explain why the regulation that tracks the precise language of the statute is not reasonable. Id. at 844. In short, whether one accepts our contention that the statutory language is clear or the majority's argument that the language is silent, application of the Chevron test to the present controversy leads to the same conclusion. HUD's regulation permitting the eviction of ignorant tenants whose household members or guests engaged in drug related criminal activity on or off public housing premises is valid and enforceable.
>
> The majority avoids the dictates of Chevron by finding that "Congress had an intention on the precise question at issue that is contrary to HUD's construction." Maj . Op. at 1039. The majority's evidence, however, is wholly insufficient to support this conclusion.

> We will discuss the evidence in greater detail below, but note here the gap between what the majority purports to prove and what it has in fact shown. According to the majority, the language of the statute is ambiguous. Maj. Op. at 1040. The legislative history noted by the majority is equally ambiguous. It simultaneously provides discretion to local PHAs and suggests how that discretion should be exercised. "It is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations." Rust v. Sullivan, 500 U.S. 173, 189-190 (1991).
>
> The remainder of the majority's congressional intent argument flows from its holding that permitting the eviction of ignorant tenants is "unreasonable" and "absurd." This holding, however, is directly contrary to HUD's interpretation of the statute. In such a circumstance, this court should defer to HUD's judgment. It is HUD, after all, that has experience and expertise in the management of public housing. It is HUD, and not this court, that can best determine what is reasonable in the context of the public housing drug crisis.

Id. at *45-47 (footnote omitted). See also Minneapolis Public Housing Authority v. Lor, supra, 591 N.W.2d at 703.

Like the majority in Rucker, the Commonwealth Court of Pennsylvania here has substituted its own judgment for that of Congress and that of HUD. In so doing, it far

exceeded its proper role, essentially nullifying an important part of the federal plan for combating crime and drugs in America.

As one state court considering this same issue noted:

> [S]tate nullification of federally-mandated lease provisions based upon a finding of unreasonableness would tear at very roots of our federal system. [A state] is free to disagree with federal policy. It may not, however, create an insurmountable "obstacle to the accomplishment and execution of the full purposes and objectives of Congress. ...Interference by the state judiciary with respect to a responsibility conferred upon a federal agency with presumed expertise in its assigned field would be inherently abrasive.

Housing Authority & Urban Redevelopment Agency of Atlantic City v. Spratley, 327 N.J. Super. 246, 255-56, 743 A.2d 309, 314 (N.J. Super. App. Div. 1999) (Though recognizing the "draconian" nature of "one strike" federal policy, and despite New Jersey's statute requiring an evicted tenant must have known of drug activity, the court held that the lower court erred in refusing to enforce federally-mandated accountability provision). See also Memphis Housing Authority v. Thompson, supra (describing limits of court's discretion in light of federal regulations).

The Commonwealth Court of Pennsylvania, in its holding, has effectively voided an important federal policy. This Court should review and correct that error.

V. CONCLUSION

For the foregoing reasons, Petitioner Delaware County Housing Authority respectfully requests that this Court issue a writ of certiorari to the Commonwealth Court of Pennsylvania.

Respectfully submitted,

January 30, 2001

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DELAWARE COUNTY HOUSING AUTHORITY,	: No. 386 M.D. Allocatur : Docket 2000
Petitioner	: Petition for Allowance of : Appeal from : the Commonwealth Court
v.	:
BARBARA BISHOP,	:
Respondent	:

ORDER

PER CURIAM:

AND NOW, this 3rd day of November 2000, the petition for allowance of appeal is denied.

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

DELAWARE COUNTY	:	
HOUSING AUTHORITY,	:	
Appellant	:	
	:	
v.	:	No. 1007 C.D. 1999
	:	
BARBARA BISHOP	:	

NOW, May 8, 2000, having considered appellant's application for reargument, the application is denied.

BY THE COURT:

s/JOSEPH T. DOYLE, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE COUNTY HOUSING AUTHORITY, Appellant	:	
v.	:	No. 1007 C.D. 1999
	:	Submitted: January 14, 2000
BARBARA BISHOP	:	

BEFORE:
HONORABLE JOSEPH T. DOYLE, President Judge
HONORABLE ROCHELLE S. FRIEDMAN,,Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge.

OPINION BY JUDGE FRIEDMAN
FILED: February 28, 2000

The Delaware County Housing Authority (Authority) appeals from an order of the Court of Common Pleas of Delaware County (trial court) denying the Authority's post-trial motion and entering judgment in favor of Barbara Bishop (Bishop). The Authority had attempted to terminate Bishop's federally subsidized housing benefits due to the criminal activities of Bishop's sons who resided with her in her dwelling unit. For the following reasons, we affirm.

Since September of 1979, Bishop has resided at 536 Front Street, Upland, in the Upland Terrace Public Housing Development (Development), in Delaware County, pursuant to a lease with the Authority. (Trial court op. at 1; R.R. at 29a, 73a.) The lease identifies the occupants of the premises

as Bishop and her two adult sons, Nathaniel Bishop and Ralph Walters. (Trial court op. at 1; R.R. at 73a.) Although his name was on Bishop's lease, Nathaniel Bishop did not reside at his mother's home; instead, he lived with his girlfriend at 1212 Holland Avenue. (Trial court op. at 1, 9; R.R. at 45a-46a.) However, on September 17, 1995, following a fight with his girlfriend, Nathaniel, who was then twenty-one years old, left his girlfriend's home to return to his mother's home in the Development. (Trial court op. at 1-2; R.R. at 45a, 53a.) Five days later, on September 22, 1995, Nathaniel robbed and raped a sixty-eight year old woman, also a resident of the Development, in her home. Bishop was away in Connecticut at the time. (Trial court op. at 1, 7, 9; R.R. at 53a, 54a, 100a.) Nathaniel subsequently was convicted of burglary, robbery, rape, unlawful restraint and theft by unlawful taking or disposition; he was sentenced to serve a prison term of thirteen years and four months to thirty years. (Trial court op. at 1; R.R. at 8a, 107a.)

On October 5, 1995, as a result of the robbery/rape, the Upland Borough Police Department executed a search warrant on Bishop's home. The police found a small amount of cocaine and marijuana, which they determined to be in the exclusive control[1] of Bishop's older son, Ralph Walters, then thirty-two years old. (Trial court op. at 2, 7; R.R. at 13a-14a, 98a.) Ralph Walters pleaded guilty to drug possession and was placed into the Accelerated Rehabilitative Disposition Program. (Trial court op. at 2; R.R. at 8a, 99a.)

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[1] At the time the warrant was executed, Bishop was upstairs in her bedroom and not in the presence of her son. (Trial court op. at 8-9; R.R. at 12, 13, 47a.)

As a result of her sons' criminal activity, the Authority initiated proceedings to evict Bishop from her dwelling unit[2] for violating section 7L of her lease, which states that tenants are obliged:

> Not to engage in criminal activity, including drug-related criminal activity, on or near the public housing premises, and to have the Tenant's guests, any family member or other person under the Tenant's control refrain from such activity.

(R.R. at 82a; trial court op. at 2.)

The Authority filed a complaint with the District Justice, who ruled against Bishop, and Bishop appealed. A panel of arbitrators in the trial court entered an award in favor of Bishop, and the Authority appealed from that award by filing, in the trial court, an action in ejectment for possession of the premises. (Trial court op. at 3; R.R. at 110a, 112a.)

Following a non-jury trial, the trial court entered judgment in favor of Bishop. (Trial court op. at 3.) The Authority filed a motion for post-trial relief, seeking judgment in favor of the Authority or, in the alternative, a

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[2] On October 13, 1995 and again on October 30, 1995, the Authority sent Bishop a notice of termination and a notice to quit the premises as a result of Nathaniel Bishop's criminal activity. (Trial court op. at 2; R.R. at 95a, 96a.) On November 14, 1995, the Authority sent Bishop a notice to quit the premises as a result of Ralph Walter's criminal activity. (Trial court op. at 2; R.R. at 97a.)

new trial. (R.R. at 162a.) The trial court denied the Authority's post-trial motion. In its supporting opinion, the trial court found that, in evicting Bishop, the Authority failed to consider the following mitigating factors: (1) Bishop lived peacefully in her home for nearly twenty years before her sons' criminal activity; (2) Bishop herself had not been involved in any criminal activity; (3) although her adult sons were involved in criminal activity while residing with Bishop, there was no evidence that they were under Bishop's control, as Bishop is not legally responsible for the acts of her twenty-one and thirty-two year-old sons; and (4) there was no evidence that Bishop was aware of her sons' criminal activity. (Trial court op. at 6-7.) Thus, the trial court determined that the Authority's eviction of Bishop was a "manifest and flagrant abuse of discretion or a purely arbitrary execution of [its] duties." (Trial court op. at 13.) The Authority's appeal to this court followed.

On appeal,[3] the Authority argues that Bishop's lease, as well as the Code of Federal Regulations, permit the eviction of Bishop for the criminal activity of her sons and that the trial court improperly substituted its discretion for that of the Authority in refusing to uphold Bishop's eviction. (Authority's brief at 3.)

In support of its argument, the Authority relies on the cases of Allegheny County Housing Authority v. Liddell, 722 A.2d 750 (Pa. Cmwlth. 1998), and Housing Authority of

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[3] Our scope of review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Allegheny County Housing Authority v. Liddell, 722 A.2d 750 (Pa. Cmwlth. 1998).

City of York v. Dickerson, 715 A.2d 525 (Pa. Cmwlth. 1998), appeal denied, ___ Pa. ____ , 742 A.2d 172 (1999). In Liddell, the Court of Common Pleas of Allegheny County refused to evict a tenant as a result of the drug conviction of the tenant's cousin, who temporarily resided with her while awaiting the availability of his own apartment. In Dickerson, the Court of Common Pleas of York County refused to evict a tenant whose minor grandson, who resided with the tenant, was arrested for robbery and burglary. In both cases, the common pleas courts concluded that the housing authorities abused their discretion by failing to consider all mitigating factors before deciding to terminate the tenants' leases. We reversed in each case, explaining that, although the Department of Housing and Urban Development's (HUD) regulation at 24 C.F.R. §982.552(c)(1)(1995) allowed housing authorities to consider all circumstances of each case before deciding whether to terminate a lease as a result of criminal activity, that regulation did not require that they do so. Thus, we held that those housing authorities did not abuse their discretion in failing to consider mitigating circumstances prior to deciding to terminate the tenants' leases.

The Authority maintains that the trial court failed to follow Liddell and Dickerson, and, instead, improperly relied upon this court's earlier decision in Housing Authority of the City of York v. Ismond, 700 A.2d 559 (Pa. Cmwlth. 1997), aff'd, 556 Pa. 436, 729 A.2d 70 (1999), in which we held that housing authorities must consider all mitigating circumstances before evicting a tenant for the criminal acts of another. The Authority correctly points out that our decision in Ismond was limited to the HUD regulation in

force prior to October 2, 1995.[4] The Authority also correctly points out that HUD amended that regulation, effective October 2, 1995, (See 60 Fed. Reg. 45,661 (1995)), and that under the amended regulation, the Authority is not required to consider mitigating factors prior to eviction. See Dickerson, Liddell.

In this regard, we note that Nathaniel's criminal conduct that, in part, formed the basis for the Authority's decision to evict Bishop, occurred on September 22, 1995, prior to the effective date of the amended regulation. Thus, because Ismond remains controlling with respect to Nathaniel's conduct, the Authority would have been required to consider mitigating factors, had Nathaniel been the only one to engage in criminal conduct. However, Bishop's other son, Ralph Walters, also engaged in criminal conduct, and that conduct occurred on October 5, 1995, three days after the effective date of the new regulation. Thus, Walters' criminal activity falls within the scope of the amended regulation, which permits the Authority discretion whether to consider mitigating factors. See Liddell, Dickerson.

Nevertheless, we cannot agree with the Authority that it has complete discretion[5] to evict a tenant under the

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[4] 24 C.F.R. § 882.216(c)(2).

[5] Where an administrative agency possesses discretionary power to take actions, courts may not reverse the agency's action absent an abuse of discretion. Liddell. In Liddell, we stated that we were limited to determining "whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." Id. at 753

(continued...)

circumstances presented here, where the tenant had no knowledge of the criminal activity and had no control over those who committed the offenses. Neither the lease nor the federal law on which it is premised imbues the Authority with such wide-ranging power.

We agree with the trial court that section 7L of Bishop's lease limits eviction to situations where a tenant has control over the person committing the criminal activity. That lease provision requires that Bishop ensure that her guests, family members or other persons under her control refrain from engaging in criminal activity on or near the public housing premises. (R.R. at 82a; trial court op. at 2.) The trial court found that Bishop's two adult sons were not under her control; substantial evidence supports that finding.[6]

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[5](...continued)
(quoting Blumenschein v. Housing Auth. of Pittsburgh, 379 Pa. 566, 573, 109 A.2d 331, 335 (1954)). However, our supreme court has held that there is no distinction between a manifest abuse of discretion and an abuse of discretion, explaining that "the use of the term 'manifest' in 'manifest abuse of discretion' has no legal significance and is, therefore, unnecessary to describe the applicable standard." Jacobs v. Halloran, 551 Pa. 350, 354 n. 5, 710 A.2d 1098, 1101 n. 5 (1998) (citations omitted).

[6] The Authority argues that the evidence showed that "Bishop allowed criminal activity to take place in" her home and, thus, the trial court erred by finding that Bishop lacked knowledge of her sons' criminal conduct. (Authority's brief at 10.) We cannot agree. After carefully reviewing the evidence, we find nothing to indicate that Bishop was aware of her sons' criminal conduct; in fact, the evidence is to the contrary.

(continued...)

Because we cannot discern whether the phrase "under

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[6](...continued)

With respect to Bishop's knowledge of Nathaniel's criminal conduct, the Authority points to the fact that Bishop knew that her son had been in jail on a previous occasion. (Authority's brief at 10.) Bishop did acknowledge that Nathaniel had been in jail from March 20, 1995 to July 21, 1995 for a probation violation, (R.R. at 54a); however, there was no evidence that Nathaniel's probation revocation was the result of criminal conduct. In fact, Bishop testified that Nathaniel violated his probation by failing to report to his probation officer. (R.R. at 54a-55a.) The only evidence concerning the reason Nathaniel originally was placed on probation was that he was involved in a fight. However, the fight took place outside of Delaware County, and not on or near the public housing premises. (R.R. at 54a-55a, trial court op. at 9, 10.)

As to Ralph Walters, the Authority maintains that the affidavit of probable cause for his arrest indicates that the Criminal Investigations Division (CID) of the District Attorney's Office of Delaware County was conducting surveillance of Bishop's home based upon information from a confidential informant of drug activity in Bishop's home. (Authority's brief at 11.) The Authority then argues that, if the CID had information of drug activity in Bishop's home, clearly Bishop must have known that drugs were in her home. (Authority's brief at 11.) Again, we disagree. Even if the police were aware of drug activity by Bishop's son, it does not necessarily follow that Bishop must have been aware of that activity. Moreover, Walters' drug activity could not have been as extensive as the Authority claims inasmuch as Walters was accepted into the Accelerated Rehabilitative Disposition Program. Bishop testified at trial that she had no knowledge that Walters was involved with drugs, (R.R. at 48a-49a, 52a); nothing in the record undermines Bishop's testimony in that regard.

the Tenant's control" in section 7L of Bishop's lease modifies only the term "other person," or whether the phrase "under the Tenant's control" also modifies "guests" and/or "any family member," we must look to Congress' intent in directing housing authorities to insert such language in tenants' leases.

The United States Housing Act of 1937, as amended, 42 U.S.C. §1437d(l)(5)(1995),[7] requires that all public housing authorities use leases which

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of the tenancy.

In Charlotte Housing Authority v. Patterson, 120 N.C. App. 552, 464 S.E.2d 68 (1995),[8] the Court of Appeals of North

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[7] In 1996, Congress amended this section by substituting the phrase "on or off such premises" for the phrase "on or near such premises." See Pub. L. 104-120 § 9(a)(1). Because that amendment occurred subsequent to the events of this case, it has no effect here. Also, in 1998, Congress redesignated section 1437d(l)(5) as section 1437d(l)(6).

[8] In Charlotte Housing Authority, the housing authority sought to evict a tenant as a result of the criminal

(continued...)

Carolina had occasion to interpret section 1437d(l)(5) in a case with facts similar to those of Bishop's case and concluded that a literal interpretation of section 1437d(l)(5) would yield absurd results and would contravene Congress' clearly expressed legislative intent that the law not "impose a type of strict liability whereby the tenant is responsible for all criminal acts regardless of her knowledge or ability to control them." Id. at 557, 464 S.E.2d at 72. Instead, that court, relying on Congress' clearly expressed legislative intent, held that, under section 1437d(l)(5), "good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal activity termination provision of a public housing lease by a member of the tenant's household." Id. at 557-558, 464 S.E.2d at 72.

Because of the significance of the legislative history relied upon by that court, we set it out here:

> In its report accompanying the Cranston-Gonzalez National Affordable Housing Act, the 1990 amendment to 42 U.S.C. §1437d(l)(5), the congressional committee stated:
>
> > The Committee bill would amend a provision of the U.S. Housing Act that was added by the Anti-Drug Abuse Act of 1988. **This provision makes**

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[8](...continued)
conduct of her nineteen-year old son, who was arrested for murder, assault with a deadly weapon, discharging a firearm into an occupied dwelling and possession of a deadly weapon on the premises of the public housing authority.

criminal activity grounds for eviction of public housing tenants if that action is appropriate in light of all the facts and circumstances. This language was limited to criminal activity on or near the public housing premises.

This Section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction only if it adversely affects the health, safety, and quiet enjoyment of the premises. **The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the [public housing authority] and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.**

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5941 (emphasis added). The 1990 amendments also addressed criminal activity as cause for termination of a tenant's Section 8 assistance (a federal subsidy provided to tenants in private housing). 42 U.S.C. §

1437f(d)(1)(B)(iii) (Supp. 1993). The committee report similarly provided:

> Termination of tenancy.--The bill includes language to permit evictions from Section 8 Existing Housing for criminal activity, including drug related criminal activity. It is based on a similar provision contained in the Anti-Drug Abuse Act of 1988 governing public housing leases....**The committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit [sic].**

S.Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5889 (emphasis added).

Charlotte Housing Authority, 120 N.C. App. at 556-557, 464 S.E.2d at 71-72.[9] We agree with the reasoning of Charlotte Housing Authority and apply it here.

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[9] See also Housing Authority of the City of Jersey City v. Thomas, 318 N.J. Super. 191, 723 A.2d 119 (1999) (holding that section 1437d(l)(5) cannot be read to require the eviction of a tenant whose adult son surreptitiously entered the tenant's apartment against her will and conducted illegal drug activities in her apartment).

For the foregoing reasons, we refuse to hold a tenant strictly liable for unforeseeable criminal acts committed, without the tenant's knowledge, by family members who are not under the tenant's control. Here, because Bishop had no knowledge of her sons' criminal conduct, because her sons were not under her control, and because Bishop reasonably could not have foreseen her sons' criminal conduct, Bishop's eviction would be contrary to Congress' intent in enacting 42 U.S.C. § 1437d(l)(5). Accordingly, we affirm the order of the trial court.

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE COUNTY HOUSING AUTHORITY, Appellant	:	
v.	:	No. 1007 C.D. 1999
	:	Submitted: January 14, 2000
BARBARA BISHOP	:	

ORDER

AND NOW, this 28th day of February, 2000, the order of the Court of Common Pleas of Delaware County, dated July 23, 1999, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

DELAWARE COUNTY HOUSING AUTHORITY	:	NO. 96-50894
v.	:	
BARBARA BISHOP	:	

JULIA A. AUERBACH, ESQUIRE, attorney for the Plaintiff.
WILLIAM A. JACOBS, ESQUIRE, attorney for the Defendant.

OPINION

McGOVERN, J. DATE: 7/23/99

Plaintiff, Delaware County Housing Authority, appeals from this Court's denial of its Post-Trial Motion seeking a new trial.

Plaintiff Housing Authority initiated proceedings to evict Defendant, Barbara Bishop, from her dwelling unit at 536 Front Street, Upland, Delaware County, Pennsylvania, where she has lived as a tenant in the Upland Terrace Public Housing Development since September, 1979, pursuant to a lease agreement with the Plaintiff. (10/16/97 N.T. 29). Ralph Walters and Nathaniel Bishop are the Defendant's two adult sons who are also listed as residents of the Defendant's dwelling unit pursuant to the aforesaid lease agreement. (N.T. 44). Nathaniel Bishop, Defendant's younger son, then twenty-one years old, was arrested for robbery and rape of a sixty-eight-year old woman who also resided in the Upland

Terrace Public Housing Development. He was subsequently convicted and sentenced to serve not less than thirteen nor more than twenty years in prison. (N.T. 8). Nathaniel Bishop, prior to his arrest, was residing at 1212 Holland Avenue with a girlfriend, but his name was retained on the lease of his mother's dwelling unit. (N.T. 45). Five days before the aforesaid crimes were committed, Nathaniel had a dispute with his girlfriend and left 1212 Holland Avenue and returned to his mother's unit in Upland Terrace. (N.T. 45-46). Prior to the robbery and rape incident, Nathaniel had served four months in prison for a probation violation. (N.T. 54-55).

The Upland Borough Police Department, through Detective Michael Boudwin, executed a search warrant on October 5, 1995 allowing a search of the Defendant's dwelling unit. During that search, Ralph Walters, the Defendant's older son, then thirty-two years of age, was found to be in possession of a small amount of cocaine and marijuana. (N.T. 12). Detective Boudwin found the drugs in the exclusive control of Ralph Walters. (N.T. 13). Defendant was upstairs in her bedroom at the time the officers entered the unit and at the time her elder son was found in possession of controlled substances. (N.T. 12-13). Ralph Walters was placed into the Accelerated Rehabilitative Disposition Program as a result thereof on April 12, 1996. (N.T. 46).

Notice of the Defendant's two adult sons' criminal activity was forwarded from the Upland Borough Police Department to the Delaware County Housing Authority, and the Director of Housing, Janice Roberts, initiated action to evict the Defendant on the grounds that the latter had violated Section 7L of her lease agreement, requiring that she

not engage in criminal activity.[1] Notices of Termination were sent to Defendant on October 12, 1995 and October 30, 1995 as a result of Nathaniel Bishop's criminal activity. (N.T. 23). A Notice of Termination was also sent November 14, 1995 as a result of Ralph Walters' criminal activity. (N.T. 24).

A panel of Arbitrators reviewing the Housing Authority's eviction proceedings against the Defendant, Barbara Bishop, on January 3, 1997, granted an award in favor of the Defendant.[2] The Housing Authority appealed that arbitration decision to this Court and a nonjury trial resulted. The Court, on June 15, 1998, entered a Verdict in favor of Defendant. Plaintiff Housing Authority's Post-Trial Motion was denied, and the Plaintiff Housing Authority appealed to the Pennsylvania Superior Court. Pursuant to Pennsylvania Rule of Civil Procedure, 751, the case was transferred to the Pennsylvania Commonwealth Court March 2, 1999.

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[1] Defendant's lease agreement provides, in part: "The Tenant shall . . . .[n]ot engage in criminal activity, including drug related criminal activity, on or near the public housing Premises, and to have the Tenant's guests, and any family member or other person under the Tenant's control, refrain from such activity." (Exhibit P-1, Section 7L, p. 10).

[2] The record does not indicate whether the Defendant utilized the grievance procedures available to tenants under Housing Authority's Guidelines or some other form of arbitration. The record does reflect that the Complaint in this matter was first heard before a District Justice, from which the Defendant appealed on March 28, 1996, and the arbitration decision against the Plaintiff followed.

Plaintiff submits the following Concise Statement of Matters Complained of on Appeal:

"1. Your Honorable Court erred in denying Plaintiffs request for the eviction of Defendant, Barbara Bishop, for the following reasons:

a. . . . Defendant breached the Lease Agreement by failing to comply with Section 7.L of the Lease which provides in essence that the tenant has an obligation to prevent tenant's guests, any family members or other persons under tenant's control, from engaging in any criminal activity.

b. The Order (denying Post Trial Motion) fails to properly consider the Code of Federal Regulations Title 24 Housing and Urban Development. . .

c. The Order fails to properly consider that Defendant clearly knew that her sons had engaged in criminal activity in the past and . . . allowed her sons to reside in the unit and/or enter the unit.

d. The Order fails to recognize 53 FR 33216, 33226 . . . (which) authorizes the eviction of a tenant for criminal activity of others in the unit who commit crimes of trade in narcotics on or off project grounds.

e. The Order fails to consider the testimony of Detective Boudwin . . . which clearly established that Defendant . . . was upstairs in the unit when he entered and found drugs. . .

f. The Order fails to consider that Defendant's son, Nathaniel Bishop, who was a resident of her unit, brutally raped a 70 year old woman who lived in a unit of the . . . Housing Authority . . . yet allowed him to continue to live in the unit. . .

2. Your Honorable Court erred in denying Plaintiffs request for eviction of Defendant by acting contrary to the law as enunciated in Allegheny county Housing Authority v. Liddell. . .

a. . . . (by failing) to evict Defendant for the criminal activities of others under the tenant's control which occurred in the unit and on the Housing Authority premises. . .

b. . . . (by) substituting (This Court's) judgment for the judgment of . . . the Authority in deciding whether or not to evict the tenant for the criminal activity of others. . ."

The Plaintiff Housing Authority contends that pursuant to federal and local Housing Authority regulations, it was improper for this Court to deny Plaintiffs request for eviction of Defendant, Barbara Bishop, from her dwelling unit in the Upland Terrace Public Housing Development because of her adult sons' criminal activity. Plaintiff

presents, as authority, the Federal Register and the Delaware County Housing Authority Lease Agreement, which purportedly assess responsibility upon a tenant for the criminal acts committed by others.[3] Plaintiff argues that since Defendant failed to prevent the criminal acts of her two adult sons, she is in violation of her lease, which is governed by the Federal Housing Authority Law, and should, therefore, be evicted.

The Federal Housing Authority Regulations require that every public housing lease include a declaration that "a public housing tenant, any member of the tenant's household, or a guest, or any other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity on or near public housing premises." 42 U.S.C.A. § 1437 d(l)(5). The Federal Register provides that such "lease language will provide a strong contractual basis for action by the PHA against a tenant . . . whose household members commit crimes of physical violence or trade in narcotics, on or off project grounds." 53 FR 33216, 33226. The regulation goes on to provide that holding a "family responsib(le) for criminal acts is an effective tool in the struggle against public housing crime." 53 FR 33216, 33226. Pursuant to 42 U.S.C.A. § 1427 d(l)(5), the Delaware County Housing Authority included the referenced language in its lease providing that tenants must have "guests, any family member or other person under the Tenant's control refrain from (criminal) activity." (Delaware County Housing Authority Leasing Agreement, Section 7.L).

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[3] 53 FR 33216, 33226; Delaware County Housing Authority Lease Agreement, Section 7.L.

It has been a long held internal policy of Housing Authorities to consider mitigating circumstances in eviction proceedings where an adult family member who is not the head of the household commits a criminal offense. Housing Auth. of City of York v. Ismond, 700 A.2d 559, 562 (Pa. Cmwlth. 1997); Housing Authority of City of York v. Dickerson, 715 A.2d 525, 526 (Pa. Cmwlth. 1998). Mitigating factors were not considered where the offending family member was a juvenile on the theory that "Adults have a duty to provide proper supervision to their minor household members." Housing Authority of City of York v. Dickerson, supra, 715 A.2d at 526, n. 3. The Court explained that this ". . . policy will make parents more responsible for the behavior of their children." (Id). The Commonwealth Court has concluded, referring to Housing Authority rules, infra, that mitigating factors must be considered when evicting tenants where juvenile family members are involved in criminal conduct. Housing Auth. of City of York v. Ismond, supra. The Commonwealth Court held that the Housing Authority, pursuant to 24 C.F.R. § 882.216(c)(2) must consider all circumstances, including mitigating circumstances, in deciding whether or not to permit a family to remain in subsidized housing despite one family member's criminal activity. The referenced section was amended by 24 C.F.R. § 982.552(c)(1) and the language relied upon by the Commonwealth Court in Housing Auth. of City of York v. Ismond, supra, did not appear in the new comments to that section of the Code of Federal Regulations (hereinafter "C.F.R.").

Defendant, however, was evicted while the old rule was in effect. Her lease was terminated in October 1995. See Allegheny County Housing Authority v. Liddell, 722 A.2d 750 at 754 (Pa. Cmwlth. 1998). The Commonwealth

Court then, in Housing Authority of City of York v. Dickerson, supra, held that the Housing Authority is not required to consider all circumstances in each proceeding where a juvenile family member faces eviction because of criminal activity. The Authority is otherwise permitted to exercise reasonable discretion. Therefore, the Commonwealth Court concluded, in Housing Authority of City of York v. Dickerson, supra, that it was no longer bound by its earlier decision, in Housing Authority of City of York v. Ismond, supra. The Commonwealth Court most recently held that the Housing Authority is not bound to consider mitigating factors, but rather such consideration is discretionary. Allegheny County Housing Authority v. Liddell, supra. Plaintiff relies upon Allegheny County Housing Authority v. Liddell, supra, but that decision was handed down some sixth months after the verdict in the instant matter. Further, Housing Authority of City of York v. Ismond, supra, relied upon by this Court, was affirmed by the Pennsylvania Supreme Court May 11, 1999. Housing Authority of City of York v. Ismond, 729 A.2d 70 (Pa. 1999).

This Court concluded, and still believes, that the Plaintiff Housing Authority abused its discretion in failing to take into consideration mitigating factors in the eviction of the Defendant, Barbara Bishop, from Upland Terrace. The Defendant is not legally responsible for the acts of a twenty-one-year-old man or a thirty-two-year-old man, nor is there evidence that she knew of their activities. Therefore, she should not receive the ultimate punishment, eviction, from her home at the hands of Plaintiff. The Defendant has lived peacefully in her housing unit for nearly twenty years, and there is not even a hint that the Defendant has ever been involved in any criminal activity, directly or indirectly.

Defendant's son, Ralph Walters, was thirty-two years of age at the time he was arrested for possession of drugs which were in his exclusive possession and control. His presence in Defendant's home hardly classifies him as "a member of the tenant's household, or any guest, or other persons under the tenant's control." (Emphasis added). There is not a scintilla of evidence in this record indicating that the Defendant had any control over this individual, nor is there a scintilla of evidence indicating Defendant had, or should have had, any knowledge of her son's activities in this regard. Therefore, the Defendant is not in violation of 42 U.S.C.A. §1437(1)(5). Nathaniel Bishop, Defendant's other son, at the time of his arrest, was likewise not a member of the Defendant's household, but was living with a girlfriend at an entirely different address until five days before his crime. (NT. 45). Defendant is not accountable for Mr. Bishop either as a member of her household or someone over whom she bad control. While Defendant admits not removing Mr. Bishop's name from her lease, she testified that this was so that she would not violate any of the Housing Authority's guest provisions should her son come to stay with her. The Defendant also assumed that his name would be removed in October, 1995, when she signed a new lease. (N.T. 45). Defendant was not even in the Commonwealth of Pennsylvania when her son was arrested for robbery and rape. She had no knowledge of that crime until she returned from Connecticut. (N.T. 52-53). It was incumbent upon the Plaintiff to consider these factors in deciding whether or not to terminate Defendant's lease. Housing Auth. of City of York v. Ismond, supra.

It is recognized that the State of New Jersey has addressed the issue of evicting a family due to criminal acts of one family member in a case factually similar to the case

at bar. (Housing Authority v. Thomas, 723 A.2d 119, 120 (N.J. Super A.D. 1999)). There, the New Jersey Superior Court reviewed eviction proceedings of a Housing Authority against a mother whose adult son was found in her public housing unit in possession of cocaine, while his mother was asleep in bed. Prior to his arrest, however, the adult son had left his mother's unit in order to live with a girlfriend. The Court held that the mother did not violate 42 U.S.C.A. §1437(1)(5) because the son, according to the Court, was not a member of the household. (Id. at 121). Similarly, the North Carolina Court of Appeals held that a public housing tenant was not personally at fault for breaching the "criminal activity termination provision" of a lease agreement, and that she could not be evicted following her son's commission of a gun offense. Charlotte Hous. Auth. v. Patterson, 464 S.E. 2d 68, 71-72 (NC.Ct. Appl. 1995).

Finally, Plaintiff's position here causes one to conjure the specter of Plaintiff's situation suggesting that every time an adult household member enters the dwelling unit in a public housing project, the tenant must conduct a body search and a criminal background check at the door!

While Plaintiff argues that Defendant "clearly knew" of her son's criminal activity, there is not a scintilla of evidence in this record suggesting that to be the case. The evidence suggests quite the contrary, and the Court so concluded. Further, Plaintiff argues that Defendant violated her "obligation to prevent" that criminal activity. (Plaintiff's Concise Statement of Matters Complained of on Appeal, Paragraph 1, sections a and c). The lease in question does not impose an "obligation to prevent." Rather, as harsh as the clause appears, still it requires that Defendant exercise control where she has it. There is no evidence that Ralph

Walters engaged in any criminal activity prior to his arrest for drug possession on October 5, 1995. Defendant was upstairs in her bedroom when Detective Boudwin discovered Mr. Walters, in possession of a small amount of cocaine and marijuana and they were in Mr. Walters' exclusive control. (N.T. 49). Defendant testified she did not know her son had drugs in his possession, and that if she had come down and found him in such possession, she would have asked him to leave the unit. (N.T. 49). There is no reasonable or logical inference that can be raised from this record that the Defendant knew of her son's drug possession, or further, that she her tolerated or failed to control it in their public housing unit, just as there is no evidence that the Defendant had control over Mr. Walters.

Similarly, the record fails to support Plaintiff's suggestion that Defendant knew of and could have prevented her son Nathaniel Bishop's criminal activity, while allowing him to remain a resident in this public housing unit. Plaintiff correctly suggests that Mr. Bishop served four months in jail for a probation violation; however, there is no clear indication in this record as to why Mr. Bishop was placed on probation or as to why he was placed in jail. The best this record indicates was that Mr. Bishop had a fight. (N.T. 54). Defendant testified that her son, Nathaniel Bishop, no longer resided with her because he had moved in with a girlfriend at a different address. (N.T. 45-46). It is so that Mr. Bishop returned to Defendant's residence five days before his arrest for rape, but there is no indication he intended to live there as a household member, that Defendant had control over him, or that Defendant had any knowledge whatsoever of his criminal activity. Indeed, as hereinabove noted, the Defendant was out of the Commonwealth of Pennsylvania at the time of Mr. Bishop's arrest. (N.T. 53-54). The record

clearly supports this Court's conclusion that the Defendant had no knowledge of her son, Nathaniel Bishop's intention to commit, or commission of crimes in the housing project. The crimes were clearly not committed in the Defendant's dwelling unit. Defendant was in Connecticut. There is no basis in this record upon which Plaintiff can reasonably suggest Defendant should have foreseen her son's committing a rape because of a jail sentence for probation violation, presumably resulting from a fight. Simply because one is on probation in no way reasonably infers that such a person is a violent offender or a danger to the community or the Housing Authority.

Plaintiff argues that Court failed to give due consideration to the fact that Nathaniel Bishop raped a sixty-eight-year-old resident of the Housing Authority. (Plaintiff's Concise Statement of Matters Complained of on Appeal, Paragraph 1, Section f). Plaintiff's argument ironically undermines its position, since now the Plaintiff accuses the Court of failing to exercise discretion and consider the aggravating circumstances of the criminal offense, without giving any consideration to any mitigating circumstance of this eviction! Is the Court to conclude that the Authority considered the aggravating circumstances while ignoring the mitigating circumstances? If so, there is a more compelling reason to prevent such an eviction. However, we have not speculated. The record reveals that the relevance of the details concerning the robbery and rape was indeed discussed with Plaintiff's attorney at trial, and while considering the issue as to whether or not the Defendant had knowledge, these details were admitted as possibly relevant if the Defendant was found to have knowledge. If the Defendant lacked knowledge of the criminal activity of her son, then the

details of the robbery and rape are not relevant in this proceeding. (N.T. 9-10).

Plaintiff also accuses this Court of failing to consider the testimony of Detective Boudwin of the Upland Borough Police Department who found Defendant's adult son, Ralph Walters, in possession of a small amount of cocaine and marijuana. (Plaintiff's Concise Statement of Matters Complained of on Appeal, Paragraph 1, Section e). The assertion, again, is inaccurate. Plaintiff's counsel at trial agreed to dismiss both this witness and another (Officer Murphy) after a lengthy discussion with the Court. (N.T, 17, 19). Counsel affirmed that her only intent in having the Detective testify was to demonstrate to the Court the "'severity of the crimes" involved. (N.T. 10). The Court explained the irrelevance of those details, but nonetheless agreed to allow the testimony in light of the possibility that the Defendant might be found to have knowledge of those details prior to the crime. (N.T. 11). Trial counsel believed she could introduce evidence without those witnesses. (N.T. 11). Ultimately, the officers were permitted to leave. (N.T. 19). Further, when Plaintiff's counsel objected during Defendant's direct examination of the Defendant, this Court granted Plaintiff the option of calling Detective Boudwin on rebuttal. (N.T. 49). Plaintiff, therefore, was in no way precluded from presenting those witnesses, the substance of their testimony was otherwise presented and considered by this Court. These contentions simply have no support in this record. There is no evidence in this record or in this Court's decision that will suggest in any way that this Court failed to consider anything less than the entire record before it.

Further, Plaintiff argues that this Court erred in light of the holding in Allegheny County Housing Authority v. Lidell, supra. (Plaintiff's Concise Statement of Matters Complained of on Appeal, Paragraph 2, sections a and b). Plaintiff argues that this Court improperly substituted its judgment for the judgment of the Housing Authority. It has been hereinabove noted that Allegheny County Housing Authority v. Liddell, supra, was not decided until six months after the December 23, 1998 verdict in the case at bar. The Pennsylvania Supreme Court decision in the Housing Auth. of City of York v. Ismond, supra, has been briefly hereinabove discussed. That was the authority relied upon by this Court. The Pennsylvania Commonwealth Court held, in Housing Auth. of City of York v. Ismond, supra, that prior to terminating a family's Section 8 housing benefits because of one household member's criminal activity, a housing authority is required to consider all circumstances regardless of whether the offending family member is an adult or juvenile. It is apparent to this Court that the Housing Authority here failed to do so. The Court relied upon the language in 24 C.F.R. §882.216(c)(2), which required a consideration of all mitigating factors before making a determination to terminate assistance. However, in Housing Authority of City of York v. Dickerson, supra, the Court overruled this part of their decision in Housing Auth. of City of York v. Ismond, supra, the Court finding that the language of 24 C.F.R. §882.216(c)(2) had been amended by 24 C.F.R. 982.552(c)(1), thus indicating a change in legislative intent. The Court concluded that it was no longer bound by Housing Auth. of City of York v. Ismond, supra, concluding that the Housing Authority's exercise of discretion should not be paralyzed and open to challenge by mandating consideration of "all" circumstances in "all" cases. Housing Authority of

City of York v. Dickerson, supra, 715 A.2d at 527. However, 24 C.F.R. §882.216(c)(2) was in effect at the time of Plaintiff's termination of this Defendant's lease, and consideration of mitigating circumstances was, therefore, mandated in Defendant, Barbara Bishop's case.

Following its decision in Housing Authority of City of York v. Dickerson, supra, the Commonwealth Court again considered the issue of tenant eviction from public housing following the arrest of a household member for possession of crack cocaine on the grounds of the housing project. The tenant's cousin was living with her waiting availability of his own public housing unit, when he was arrested. Allegheny County Housing Authority v. Liddell, supra, 722 A.2d at 751-752. After a nonjury trial, verdict was entered in favor of the defendant, allowing her to remain in her unit. The Housing Authority's appeal to the Commonwealth Court presented three issues: (1) whether the trial court erred in substituting its judgment for the Housing Authority's judgment (2) whether the Authority failed to exercise discretion and consider mitigating factors; and (3) whether the Authority's "One Strike and You're Out" policy is unjust. The Commonwealth Court held that the trial court had exceeded its authority and improperly substituted its judgment for that of the Housing Authority. The Commonwealth Court observed that a review of agency action is limited to cases where there has been a "manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties,"' and that "judicial discretion may not be substituted for agency discretion." (Emphasis in original). The Court went on to conclude that the Authority is not bound to consider mitigating circumstances in eviction actions. To do so is discretionary, not mandatory. Further, the Court concluded that the "One

Strike and You're Out" is not necessarily an abuse of discretion.

The thrust in the matter at bar, however, could well be classified as "manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties." Further, this Defendant was in no position to exercise any control over her two adult sons, nor were they members of her household.

Nevertheless, the Pennsylvania Supreme Court's affirmance of Housing Auth. of City of York v. Ismond, supra, supports this Court's conclusion that Plaintiff wrongly terminated Defendant's lease in failing to take into consideration the mitigating factors that have been hereinabove discussed.

CONCLUSION

Questions concerning the admission or exclusion of evidence are, within the sound discretion of the Trial Court and will not be reversed absent a clear abuse of discretion. Henry v. McCrudden, 133 Pa. Cwth. 231; 575 A.2d 666, app. den. 526 Pa. 651, 585 A.2d 470 (1990); Catina v. Maree, 272 Pa. Super. 247, 415 A.2d 413 (1979); Juniata Foods, Inc. v. Mifflin County Development Authority, 87 Pa. Cwth. Ct. 127, 486 A.2d 1035 (1985). A wide degree of latitude in the determination of whether evidence should be admitted is vested in the Trial Court. Lynch v. McStome & Lincoln Plaza Assoc., 378 Pa. Super. 430, 548 A.2d 1276 (1988). Relevancy and probative value must be weighed against prejudicial impact in considering the admission thereof. Commonwealth v. Mance, supra. The exclusion of evidence which is irrelevant, confusing, misleading, cumulative or prejudicial is within the sound discretion of

the Trial Court and its decision thereon will not be disturbed. Concorde Investments, Inc. v. Gallagher, 345 Pa. Super. 49, 497 A.2d 637 (1985). Even were this evidence precluded as irrelevant, no error would thereunto accrue. However, the decision not to put Detective Boudwin on the stand was Plaintiff's alone, not the Court's, and, therefore, no error can fairly be attributed, thereto.

The Trial Court's ruling on a motion for new trial will be reversed only for an error of law controlling the outcome of the case or an abuse of discretion where the ruling turns on the weight of the evidence. United States Fid. and Guar. Co. v. Royer Garden Center, 1943 Pa. Cwth. 31,598 A.2d 583 (1991). It is respectfully submitted that this Court arrived at its verdict after full, thorough consideration of the applicable rules, regulations, evidence and law applicable in this matter. Nor does this record suggest any argument that the Court failed to consider all of the evidence. Further, there appears no error that would control the outcome of this case, nor is there any abuse of discretion by the Court.

It was for all of the foregoing that Plaintiff's Post-Trial Motion for a New Trial was denied.

BY THE COURT:

s/CLEMENT J. McGOVERN, JR., J.

MOTION FILED
MAR 19 2001

(2)

No. 00-1272

IN THE
SUPREME COURT OF THE UNITED STATES

DELAWARE COUNTY HOUSING AUTHORITY,
Petitoner,

V.

BARBARA BISHOP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF, OF *AMICI CURIAE*, HOUSING AND DEVELOPMENT LAW INSTITUTE AND NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY PETITIONER DELAWARE COUNTY HOUSING AUTHORITY

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39 pp

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Housing and Development Law Institute, a District of Columbia not-for-profit corporation, (HDLI) and the National

Association of Housing and Redevelopment Officials, a District of Columbia not-for-profit corporation, (NAHRO) respectfully move this Court for leave to file the attached Brief of *Amici Curiae* in support of the Petition for Certiorari of the Delaware County Housing Authority.

Movants, HDLI and NAHRO, state as follows:

1. The purpose of this motion is to request leave of this Court to file a Brief of Amici Curiae in support of the Petition for Certiorari of the Delaware County Housing authority.

2. Movants, HDLI and NAHRO have a strong interest in the legal issues raised by this case.

Housing and Development Law Institute (HDLI) is a nationwide non-profit organization that acts as a legal resource to local public housing agencies and their legal counsel. Formed in 1984, HDLI has a present membership of approximately 300 local public housing agencies and law firms. In addition to publishing periodicals and other materials and conducting educational activities relating to the law of affordable housing, HDLI acts on its members' behalf with respect to legal aspects of state and federal housing policy.

The National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide non-profit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, as the National Association of Housing Officials (NAHO), NAHRO is the oldest and largest national membership organization

devoted to affordable housing and community development. Its present membership numbers more than 8,400, including both agencies and public officials involved with affordable housing and community development throughout the Nation. NAHRO's member agencies own or manage approximately 1,340,000 units of public housing (representing 99% of all public housing in the United States), and in addition, they administer rental assistance for more than 2,000,000 housing units. In all, NAHRO member agencies administer low-income housing in which approximately 7.6 million persons reside. NAHRO has played a key role in the development and interpretation of the nation's housing programs since their inception. With respect to matters of policy, NAHRO serves fas the primary interface between the federal government and NAHRO's local housing agency members.

HDLI and NAHRO believe that the ruling in the court below, for which review by this Court is sought, is incorrect and that it unreasonably and improperly interferes with policies of the federal government and the discretionary decisions of local housing authorities, addressing the problems of illegal drugs and crime in public housing.

3. Petitioner, Delaware County Housing Authority, has given written consent through its counsel to the filing of a Brief of Amici Curiae by HDLI and NAHRO in support of its Petition for Certiorari.

Respondent, Barbara Bishop, was unrepresented in connection with the proceedings of the Commonwealth Court of Pennsylvania with respect to which review by this Court is sought. The undersigned counsel has confirmed with the legal counsel who represented Respondent at trial, that he has not

represented her in any appellate proceedings and does not now represent her. The undersigned counsel believes that it would be unseemly to seek the consent of Respondent, an unrepresented public housing tenant whose understanding of the nature and consequences of such consent could not be assured.

HDLI and NAHRO therefore respectfully request that Respondent be considered as having withheld her consent and that this Court consider this Motion as one filed under Rule 37.2(b) of the Rules of this Court.

4. This Motion and Brief are filed on the first date on which the undersigned counsel will have been admitted to the Bar of this Court, however, not within the time specified in Rule 15.3. Movant respectfully requests that the time for filing be extended until this date, as requested by letter to the Clerk of this Court in accordance with Rule 30.4.

Respectfully submitted,

March 19, 2001

William F. Maher
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Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB LAW. 573 (1998) 19

INTEREST OF THE AMICI CURIAE[1]

HDLI and NAHRO, the *amici curiae*, believe that ridding public housing developments of the historical problems of crime and violence, is crucial to maintaining the viability of public housing developments. They also believe that the process and standards under which public housing agencies enforce their leases is central to the successful management of public housing developments, crime reduction in those developments, and the physical and social well-being of the many law-abiding tenants of public housing. For these reasons, HDLI and NAHRO oppose the imposition of unnecessary or improper legal impediments to removing criminal elements from public housing because such impediments unacceptably diminish the safety, security, and quality of life for the community of public housing residents. These *amici curiae* regard the decision of the court below to constitute such an impediment.

As national organizations dedicated to the successful administration of the nation's public housing programs by local public housing authorities, HDLI and NAHRO believe that a decision by this Court concerning the issues presented in this case is necessary to assure national uniformity and to facilitate the provision of safe, decent public housing to low-income families.

SUMMARY OF ARGUMENT

A number of State courts and three federal courts have considered the issues raised by this case, with conflicting results. Guidance from this Court is necessary to assure that the applicable federal law will be properly interpreted by the state and federal courts.

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[1] In compliance with Rule 37.6 of this Court, *amici curiae*, HDLI and NAHRO state that the counsel named below, who serves as Executive Director and Counsel to HDLI, authored this brief in full, and that no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. The *amici curiae* are described in the motion accompanying this brief.

The incidence of crime and illegal drugs in public housing is a matter of great concern to the federal government. This concern is directly reflected in federal policies authorizing the removal from public housing of families whose members engage in drug-related or other serious criminal activity.

Section 6 (l)(5) of the U.S. Housing Act of 1937 and the federal regulations and public housing lease provisions implementing it clearly and unambiguously provide authority for the termination of Mrs. Bishop's tenancy in this case, irrespective of whether she knew of the criminal activities that constitute the grounds for termination or had control over the household members engaging in such activities. Because the statute is unambiguous, resort to legislative history on the part of the lower court was improper. If, *arguendo*, the lower court properly considered legislative history, it erred in failing to consider relevant legislation subsequently enacted by Congress.

The lower court erred in failing to defer to the interpretation of the statutory language by the Department of Housing and Urban Development (HUD). It also usurped the discretion properly residing with the housing authority under applicable federal law. It improperly substituted its discretionary judgement for that of the housing authority concerning the appropriateness of terminating Mrs. Bishop's tenancy.

Imposing responsibility on the head of household to ensure that the conduct of household members conforms to the requirements of the public housing lease is vital to the successful administration of the federal public housing program.

ARGUMENT

I. THE DECISIONS OF STATE AND FEDERAL COURTS THAT HAVE CONSIDERED THE ISSUES RAISED BY THIS CASE ARE IN CONFLICT. GUIDANCE FROM THIS COURT IS NECESSARY TO ASSURE THAT THE APPLICABLE FEDERAL

LAW WILL BE PROPERLY INTERPRETED BY THE STATE AND FEDERAL COURTS.

Barbara Bishop's adult son Nathaniel, age 21, who was listed as a member of the household on Mrs. Bishop's public housing lease, raped and robbed, Mrs. Bishop's 68-year old neighbor. Shortly thereafter, her adult son, Ralph, age 32, who resided with Mrs. Bishop on a full-time basis, was caught in possession of cocaine and marijuana within the family's unit. The Commonwealth Court of Pennsylvania refused to allow the eviction of this family.

Legally, this case involves whether or not section 6(l)(5)[2] of the United States Housing Act of 1937 (42 U.S.C. §1437d(l)(5)) and implementing regulations of the Department of Housing and Urban Development permit a public housing authority (PHA) to terminate the public housing tenancy of an entire household based on the criminal misconduct of household members (or guests) other than the tenant head of household, where such tenant alleges that she had neither knowledge of the criminal activity nor control over the household members who committed the offenses. Such a tenant has been variously referred to in judicial opinions as either an "innocent tenant" or an "ignorant tenant" depending on viewpoint.

The Commonwealth Court of Pennsylvania determined that the statutory language in question was ambiguous, and, resorting to committee report language in order to ascertain Congressional intent, concluded that Section 6(l)(5) of the U.S. Housing Act did not authorize the termination of Mrs. Bishop's tenancy where she had no knowledge of her sons' criminal behavior, could not have foreseen it, and had no control over her sons. Other state and federal courts considering the propriety of evicting the innocent, or ignorant, tenant have sharply divided.

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[2] The Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105-276, §575) renumbered this paragraph, which now is designated as §6(l)(6).

Since 1990, when the present version of Housing Act §6(l)(5) (now §6(l)(6)) was enacted, three federal courts, in two cases, have ruled upon the precise issues raised in this case. As discussed in some detail in the Petition, the Ninth Circuit Court of Appeals, *en banc*, recently withdrew and reversed an earlier decision of a three-judge panel of that court in Rucker v. Davis, 237 F.3rd 1113 (9th Cir. 2001). The court upheld the issuance by the Federal District Court of preliminary injunctive relief against four pending tenant evictions brought by the Oakland, CA Housing Authority. One involved off-premises drug possession by an adult household member; two involved drug possession on the premises of the development, but not in-unit, by household members who were minors; the fourth involved an incidence of in-unit drug possession by the caregiver for a disabled tenant.

Postulating hypothetical examples of possible evictions for off-premises drug use in a distant location by a household member, the court ruled 7 to 4 that the literal application of the Housing Act language and HUD's regulations would produce "odd and absurd" results that could not have been intended by Congress. Id. 1124-26. Regulations and lease provisions permitting such evictions were thus held to be unreasonable and in violation of the Housing Act's prohibition of unreasonable provisions in public housing leases. Finally, construing the reference to the tenant's "control" in the statutory language to apply to household members and guests, as well as to "other persons", the Court ruled that "the statute does not impose sanctions on tenants who have taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of another." Id. 1120, 1126. More specifically, the court fashioned its own rule, distinguishing cases in which the criminal activity occurs within the unit from those in which it occurs elsewhere, requiring in the former proof by the PHA that the tenant knew of the activity and failed to take reasonable steps to prevent it, and allowing in the latter a rebuttable presumption of knowledge on the part of the tenant. Id. 1126-27.

The four-member dissent asserted that the Housing Act is unambiguous, that the plain language of the statute authorizes the eviction of "ignorant tenants", and that the use of legislative history and hypotheticals by the majority was improper. Further, even if ambiguous the interpretation of the statute by HUD was permissible and reasonable and should be upheld under the doctrine of Chevron v. Natural Res. Def. Council Inc. *infra*. Id. 1128-29. The dissenting opinion also sharply criticized the interventionist approach taken by the majority, stating "If the majority believes HUD's construction of the statute is unconstitutional it should say so.... However, when this court rewrites legislative enactments and ignores the considered judgment of executive agencies –based on nothing more than the majority's understanding of what is "reasonable" or "absurd" – it is this court that has overstepped its constitutional limits." Id. 1129.

Petition to this Court by the Government concerning the decision of the Ninth Circuit Court of Appeals in Rucker is under consideration.

Subsequent to issuance of the opinion by the three-judge panel in Rucker, but before publication of the *en banc* opinion in that case, the United States District Court, Middle District of Florida, rejected a challenge to the eviction of several "innocent tenants" in Burton v. Tampa Housing Authority, Case. No. 8:99-cv-1238-T-26E (Unreported). The District Court granted the housing authority's motion for summary judgment, expressly following the reasoning of the three-judge panel in Rucker and an earlier opinion of the Fifth Circuit Court of Appeals in Chavez v. Housing Authority of the City of El Paso, 973 F.2d 1245 (5th Cir. 1992) which rejected various constitutional challenges to a housing authority policy that held tenants responsible for the on-premises criminal activity of guests. Like those in Rucker, the plaintiffs in Burton advanced constitutional and other theories, including the assertion that the statute is ambiguous and that resort to legislative history was necessary. In granting summary judgment, the District Court ruled that the statute was plain and unambiguous and that no resort to legislative history was therefore

necessary or appropriate. This ruling is under appeal to the Eleventh Circuit Court of Appeals.

The Supreme Courts of Minnesota and Tennessee, the only state Supreme Courts that have considered the issues in this case, reached contradictory results. Compare Minneapolis Public Housing Authority v. Lor, 591 N..W.2d 700 (Minn. 1999) (upholding eviction of entire family for drive-by shooting on public housing premises in which tenant's son participated, recognizing no requirement for proof of the tenants knowledge or participation, and limiting the scope of judicial review to determination of lease violation) with Memphis Housing Authority v. Thompson, 2001 Tenn. LEXIS 106 (Tenn. Feb. 20, 2001) (disallowing eviction of tenant for drug possession of guest occurring in her public housing unit, finding the lease provision based on federal statute and regulations to be ambiguous and construing it against the drafter).

Unsurprisingly, state intermediate appellate courts are in confusion regarding these issues. A number of state intermediate appellate courts have upheld terminations of tenancy in innocent tenant cases under various factual circumstances E.g., Housing Authority of New Orleans v. Green, 657 So.2d 552 (La. App. 4th Cir. 1995), app. denied, 661 So.2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996) (allowed eviction of tenant for drug-related criminal activity of son based on tenant's contractual obligation under the lease to assure that such activity did not occur); Minneapolis Public Housing Authority v. Holloway, CO-95-391, 1995 Minn. App. LEXIS 1028 (Minn. Ct. App. Aug. 15, 1995) (permitted eviction of tenant for criminal activity by persons allowed in her unit, rejecting argument that eviction was improper where the tenant could not have foreseen the activity or controlled the events leading to the termination of her tenancy); South San Francisco Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 49 Cal. Rptr. 2d 367 (1995) (eviction of entire family for son's drug possession allowed despite lack of parents' knowledge, where lease contractually obligated tenant to assure that drug crime not occur in the unit); Allegheny County Housing

Authority v. Liddell, 722 A.2d 750 (Pa. Commw. Ct. 1998) (PHA did not abuse its discretion in evicting innocent/ignorant tenant for drug-related crime of guest outside the unit, and lower court, in refusing to evict, improperly substituted its discretion for that of the PHA); Syracuse Housing Authority. v. Boule, 172 Misc.2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), aff'd, 177 Misc.2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), rev'd, 265 A.D.2d 832, 701 N.Y.S.2d 541 (N.Y.App.Div. 4th Dep't 1999) (eviction of tenant permitted where tenant's babysitter and others had engaged in drug-related criminal activity in tenant's unit while she was at work and presumably unaware of the activity); Memphis Housing Authority v. Thompson, 1999 Tenn. App. LEXIS 506 (Tenn. Ct. of App. July 29, 1999) (allowed eviction for drug possession of guest where tenant had no prior knowledge of the criminal activity, ruling that tenant violated lease when she allowed the perpetrator into her unit and subsequently failed to assure that he did not engage in criminal activity there) rev'd 2001 Tenn. LEXIS 106 (Tenn. Feb. 20, 2001); Willock v. Schenectady Municipal Housing Authority, 706 N.Y.S.2d 503 (N.Y. App. Div. 2000) (where neither the statute nor HUD's regulation sets forth a requirement for knowledge by the tenant, eviction of tenant for drug possession of a guest was proper); Ann Arbor Housing Commission v. Wells, 618 N.W.2d 43 (Mich. Ct. App. 2000) (eviction of tenant for drug-related crime of brother was proper regardless of whether tenant had knowledge of the illegal activity) See also, Housing Authority & Urban Redevelopment Agency of Atlantic City v. Spratley, 327 N.J. Super. 246, 743 A.2d 309 (N.J. Super. App. Div. 1999) (federal law preempted New Jersey's anti-eviction law and federally mandated lease provisions holding tenant accountable for acts of household members or guests are not unreasonable and must be enforced); Barajas v. Housing Authority of Harlingen, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (where household member sold drugs outside the unit, eviction of co-tenant was within the discretion of the housing authority).

A number of state intermediate appellate courts have reached the opposite result. E.g., Housing Authority of Charlotte v. Patterson,

464 S.E.2d 68 (N.C. App. 1995) (refusing to evict tenant for her son's homicide of neighbor where unless personal fault of tenant could be shown, resorting to Committee Report to ascertain Congressional intent after finding § 6(l)(5) of the Housing Act to be ambiguous); Vargas v. Franco, 656 N.Y.S.2d 628 (N.Y. App. Div. 1997) (refusing to evict tenant for repeated acts of graffiti outside the unit by tenant's son because eviction penalty deemed too harsh); Housing Authority of the City of Hoboken v. Alicea, 297 N.J Super. 310 (N.J. Super. Ct. App. Div. 1997) (PHA could evict tenant for drug possession of son in unit only if it could show that the tenant both permitted the offender to stay in the apartment and knew of his illegal activities); Dolson v. Middletown Housing Authority, 672 N.Y.S.2d 665 (N.Y. Sup. Ct. 1998) (tenant was not vicariously liable for conduct of her son) Minneapolis Public Housing Authority v. Lor, 578 N.W.2d 8 (Minn. Ct. App. 1998) (refusing to evict for son's participation in drive-by shooting on equitable grounds where tenant was out of town at the time and did not know of or participate in the criminal act) rev'd 591 N.W.2d 700 (Minn. 1999).[3]

II. THE INCIDENCE OF CRIME AND ILLEGAL DRUGS IN PUBLIC HOUSING IS A MATTER OF GREAT CONCERN TO THE FEDERAL GOVERNMENT. THIS CONCERN IS DIRECTLY REFLECTED IN FEDERAL POLICIES AUTHORIZING THE REMOVAL FROM PUBLIC HOUSING OF FAMILIES WHOSE MEMBERS ENGAGE IN DRUG-RELATED

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[3] The "innocent tenant" issue has also arisen in connection with terminations of Section 8 rental assistance. See e.g., American Apartment Management Co. v. Phillips, 653 N.E.2d 834 (Ill. Ct. App. 1995) (disallowing eviction on finding that lease provision similar to public housing lease provision at issue here was ambiguous and to be construed against the drafter) Phillips Neighborhood Housing Trust v. Brown, 564 N.W.2d 573 (Minn. Ct. App. 1997) (permitting eviction of both co-tenants for misconduct of one); Kimball Hill Management Company v. Roper, 733 N.E.2d 458 (Ill. Ct. App. 2000) (tenant must have some minimal connection with the criminal activity of third party to be subject to eviction).

OR OTHER SERIOUS CRIMINAL ACTIVITY.

While public housing was originally conceived in the late 1930's as a temporary way station for an out-of work middle class, by the mid-1980's many public housing developments had, for a variety of reasons, become the permanent home to families who represented the "poorest of the poor."[4] A majority of public housing residents were by then unemployed, becoming progressively more isolated from mainstream society, both socially and economically. Id. 897. These circumstances were accompanied by significant increases in the rates of crime, particularly drug-related crime. By 1988, the twin problems of crime and drugs in public housing were perceived as sufficiently serious to warrant passage by Congress of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4295, 42 U.S.C. §11901 *et seq.*[5]

The depth of the federal government's commitment to reduce illegal drugs and crime in public housing is seen, among other things, in the award by the Department of Housing and Urban Development

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[4] See generally, Schill, *Privatizing Low Income Housing Assistance: The Case for Public Housing*, 75 CORNELL L. REV. 878 (1990)

[5] The Anti-Drug Abuse Act contained, *inter alia*, the following findings: "(1) the Federal Government has a duty to provide public housing that is decent, safe and free of illegal drugs; (2) public housing projects in many areas suffer from rampant drug related crime; (3) drug dealers are increasingly imposing a reign of terror on public housing tenants; (4) the increase in drug-related crime not only leads to murders, muggings and other forms of violence against tenants, but also a deterioration in the physical environment that requires substantial governmental expenditures;..." 42 U.S.C. § 11901.

of grants aggregating more than *$2 billion*[6] under the Public and Indian Housing Drug Elimination Program authorized in the Anti-Drug Abuse Act. This funding has been earmarked solely for activities aimed at achieving a reduction of drug use and other crime in public and assisted housing.

Moreover, in March, 1996, President Clinton announced a federal anti-crime initiative known as "One Strike and You're Out" directing public housing authorities to enforce strictly lease provisions authorizing the eviction of public housing tenants. Under present federal policy enunciated in the "One-Strike and You're Out" initiative, public housing agencies are under a legal *obligation* to remove criminals from their properties.[7] In addition, HUD's Inspector General and the U.S. Department of Justice (DOJ) acted jointly in 1994 to create an anti-crime initiative in public housing known as "Operation Safe Home." This initiative establishes and operates intergovernmental task forces whose sole purpose is attacking crime in public and assisted housing. This program in public housing is coordinated with Drug Elimination Program activities and another DOJ initiative known as "Operation Weed and Seed," which seeks to reduce crime in public housing by combining crime suppression activities and social services.

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[6] HUD News Release No. 99-233, dated November 16, 1999, announced that more than $1.9 billion in Drug Elimination Grants had been awarded since 1989. The FY 2000 appropriation added approximately $310 million to this amount according to Agency Budget Summaries available electronically from the Office of National Drug Control Policy.

[7] It may be noted that public housing agencies that fail to protect tenants from criminal wrongdoers, including other tenants, may also be held liable for damages in tort, and on other grounds, for failing to provide adequate safety and security to their tenants. See e.g, Zuniga v Housing Authority of the City of Los Angeles, 48 Cal. Rptr. 2d 353, 41 Cal. App. 4th 82 (1995).

In addition to authorizing the Drug Elimination Program, the 1988 Anti-Drug Abuse Act, amended Section 6(l) of the United States Housing Act to enable those operating public housing to remove from tenancy families whose members engage in drug-related and other crime. Specifically, the amendment added to the public housing lease provisions mandated by Section 6(l) of the Housing Act, the following new provision requiring that public housing leases provide that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

Id., §5101, 42 U.S.C. §1437d(l)(5). This paragraph was amended and restated (without substantive change to the portions of the language at issue in this case) by the Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA) (Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990).[8] The amended language requires public housing agencies to utilize leases that:

> (5) provide that any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of household, or any guest or other person under the tenant's

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[8] The seriousness with which the 105th Congress regarded the problems of drug and crime in public housing may also be seen in its enactment in 1990 of Cranston-Gonzalez Act § 503(a). This provision added new subsection 6(k) to the U.S. Housing Act, allowing terminations of public housing tenancy involving drug-related and other criminal behavior that threatens other residents to be excluded from the PHA's administrative grievance procedure where the state eviction statute is determined by HUD to contain the elements of due process.

control, shall be cause for termination of tenancy. Id.

The 1990 amendment to Section 6(l)(5) of the U.S. Housing Act was implemented by the Department of Housing and Urban Development (HUD) by final rule, published October 11, 1991, entitled "Public Housing Lease and Grievance." (56 FR 51560 *et seq.*) The particular portions of this rule, which implement Section 6(l)(5), are found at 24 CFR §§ 966.4((f)(12) and 966.4(l)(2)(ii). These provisions closely track the statute and require public housing leases to contain provisions that obligate the tenant to assure that neither the tenant nor any household member, guest or other person under the tenant's control commit crimes. These regulatory provisions, in pertinent part, together with a copy of the pertinent provision of Mrs. Bishop's lease are set forth in the Appendix.

III. THE STATUTE AND REGULATIONS ARE CLEAR AND UNAMBIGUOUS. THEY PROVIDE UNEQUIVOCAL AUTHORITY FOR THE TERMINATION OF MRS. BISHOP'S TENANCY, IRRESPECTIVE OF HER KNOWLEDGE OF OR PARTICIPATION IN THE CRIMINAL ACTIVITIES OF HER SONS OR HER CONTROL OVER THEM.

That the very serious criminal activity in this case - acts of rape, robbery, and drug possession - constitute a sufficient basis for eviction, absent questions of the personal involvement of the tenant, Mrs Bishop, is not in dispute. However, the lower court found the statute and regulation to be ambiguous as it regards the eviction of a so-called "innocent tenant" such as Mrs. Bishop who asserts that she had no knowledge that the crimes committed by her sons would occur and that she had, in any event, no control over her sons.

Amici Curiae urge that the statutory language is not ambiguous. It plainly says that PHAs are required to utilize public housing leases providing that it shall be cause for termination of tenancy if either (1) the tenant, or (2) any household member, (3) or any guest or (4) any other person under the tenant's control, engages

in certain types of criminal activities. The statutory language contains no mention of a requirement of personal fault on the part of the head of household, or of knowledge or control over a household member. An ordinary reading of the statutory text will indicate that the word "control" refers to "another person" or possibly most broadly to a "guest or other person" under the tenant's control, not to a household member.

A. RESORT TO LEGISLATIVE HISTORY ON THE PART OF THE LOWER COURT TO READ INTO THE LAW A REQUIREMENT FOR KNOWLEDGE ON THE PART OF THE TENANT WAS IMPROPER.

The assertion of the lower court is, in essence, that the language of the statute is ambiguous, not so much because of what it says, but rather because of what it does not say. Applying such a standard subjects virtually any text that does not elaborate what it does not mean, or what it does not say, to a charge of ambiguity. This Court has stated that where the statutory command is straightforward, there is no reason to resort to legislative history. "Where there is no ambiguity in the words, there is no room for construction." United States v. Gonzales, 117 S.Ct. 1032, 1036 (1997). Only an "absurd or glaringly unjust result" "would warrant departure from the plain language of the statute." Inter-Modal Rail Employees Ass'n v. Atchison T&SF Ry. Co., 117 S.Ct 1513, 1516 (1997). "We have repeatedly recognized that "[when]...the terms of a statute [are] unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances....In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." United States v. James, 478 U.S. 597, 606 (1986) (internal quotations and citations omitted). By these standards, and seen in the larger context of federal housing policy, Housing Act § 6(l)(5) should be given its plain meaning.

B. IF, *ARGUENDO*, THE LOWER COURT PROPERLY RESORTED TO LEGISLATIVE HISTORY, IT ERRED IN

FAILING TO CONSIDER RELEVANT LEGISLATION SUBSEQUENTLY ENACTED BY CONGRESS INDICATING A CONGRESSIONAL INTENT CONTRARY TO THAT ASSERTED BY THE LOWER COURT.

Housing Act §6(l)(5) was first enacted, substantively, in the 1988 Anti-Drug Abuse Act. This paragraph was amended and restated in the Cranston-Gonzalez National Affordable Housing Act of 1990, but without change to the operative portion of the language defining the persons whose acts will subject a public housing tenant to termination of tenancy - *i.e.*, "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control". The committee report language relied upon by the lower court relates to the 1990 reenactment of this language.

To the extent that resort to materials extrinsic to the statutory language (construing statutory language previously enacted) is considered appropriate, *amici curiae* urge that consideration of subsequent legislation relating to control of crime in public housing would also be appropriate. Since 1990, Congress has legislated four times with respect to control of illegal drugs and crime in public housing. Its most direct expression of Congressional intent to authorize the exclusion and removal of entire households from public housing because of the criminal activity of individual members of the household is found in Subtitle F of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276 (1998), §§ 575-579.[9]

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[9] Although not yet not reflected in the HUD regulations, §9(a)(2) of the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, substituted the word "off" for the word "near" in this paragraph, thus permitting termination of public housing tenancy for drug-related criminal activity occurring off, but not necessarily near, the premises of public housing developments. The Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 903, amended Sections 6(l) and 8(d)(1)

§ 576(b) requires PHAs to establish standards that prohibit admission to federally assisted housing [which is defined to include public housing] for "any household with a member" who the PHA determines is illegally using a controlled substance or with respect to whom the PHA has reasonable cause to believe that such household member has a pattern of abuse of drugs or alcohol that may interfere with the health, safety or peaceful enjoyment of the premises by other residents.

§ 576(c), which relates to denials of assistance based on criminal background, provides that if a PHA determines "that an applicant or any member of the applicants's household" is or was during a reasonable period preceding the application engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety or right to peaceful enjoyment of other residents, the PHA may deny "such applicant" [*i.e.*, household] admission to the program or the federally assisted housing.

§ 577(a) provides: "Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable) shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that allow the agency or owner (as

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of the U.S. Housing Act to authorize the termination of tenancy of tenants who are fleeing to avoid prosecution for a felony or are probation or parole violators (applied only to "tenants" without mention of household members). The VA, HUD and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, § 428, required PHAs to establish standards of occupancy that permanently prohibit admission to public housing or Section 8 programs, and "immediately and permanently" terminate the tenancy of any person convicted of manufacturing methamphetamines in a public housing unit.

applicable) to terminate the tenancy or assistance for any household with a member - [who is illegally using drugs or whose abuse of drugs or alcohol may constitute a threat to other residents]."(emphasis added)

In the face of this legislation, enacted in the context of HUD's "One-Strike and You're Out" Initiative, it is impossible to conclude that present federal policy prohibits the eviction of the "innocent tenant."

IV. IMPOSING RESPONSIBILITY ON THE HEAD OF HOUSEHOLD TO ENSURE THAT THE CONDUCT OF HOUSEHOLD MEMBERS CONFORMS TO THE REQUIREMENTS OF THE PUBLIC HOUSING LEASE IS ESSENTIAL TO THE SUCCESSFUL ADMINISTRATION OF THE FEDERAL PUBLIC HOUSING PROGRAM.

Imposing upon public housing agencies a requirement that they prove knowledge on the part of tenants concerning the activities of other household members is impractical. As pointed out in HUD's preamble to the 1991 Lease and Grievance rule, in practice it may be extremely difficult or impossible for a public housing agency to show that the tenant knew or could have foreseen a criminal act or failed to take all reasonable measures to prevent it. (56 FR 51567, See. Appendix) Agencies may have no capability to rebut self-serving testimony on the part of household members, whatever the truth may be. Public housing agencies (and other residents) should not be required by the courts to await victimization by a reoccurrence of criminal behavior before being able to evict. As both HUD and local officials have observed, the only practicable policy for deterring criminal misconduct in public housing members of public housing households must be to hold the only persons in a position to know all the facts responsible for the household's behavior.

V. THE LOWER COURT ERRED IN FAILING TO DEFER TO THE DEFINITIVE INTERPRETATION OF THE STATUTORY

LANGUAGE BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

The meaning ascribed by the lower court to Housing Act subsection 6(l)(5) directly contradicts conclusions reached concerning this language by HUD. The preamble to HUD's 1991 Lease and Grievance final rule, promulgating the applicable regulations, makes it clear that, with respect to the responsibility of the head of household for the conduct of other members of the household, HUD regards the language of subsection 6(l)(5) of the U.S. Housing Act as setting forth a liability standard based on contractual obligation. The standard is not vicarious, but rather direct, and it is unequivocal. Section 3.3 of the preamble discusses the rationale for the federal position and makes it clear the head of household has an affirmative obligation to ensure that members of the household do not engage in prohibited criminal behaviors. The text of this section of the preamble is set forth in full in the Appendix. The preamble addressed public comments received from advocacy groups objecting to the proposed regulatory language and urging that the rule be changed so that eviction of a public housing tenant for misconduct on the part of other household members be predicated on actual knowledge or ability to control. HUD rejected these suggestions.(56 FR 51566)

As pointed out in the Petition, this Court has repeatedly held that, where an agency charged with enforcing a statute has rendered an interpretation that is a permissible construction of the statute, a court may not substitute its own interpretation for that of the agency. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The lower court has raised no question of constitutionality in this case. Rather, in refusing to enforce the lease implementing the regulatory language, it has, in substance simply repudiated HUD's clear interpretation of the statute set forth in the regulatory preamble. In so doing, the lower court erred under Chevron.

VI. THE LOWER COURT USURPED THE DISCRETION PROPERLY RESIDING WITH THE HOUSING AUTHORITY

UNDER APPLICABLE FEDERAL LAW, IMPROPERLY SUBSTITUTING ITS DISCRETIONARY JUDGMENT FOR THAT OF THE HOUSING AUTHORITY CONCERNING THE APPROPRIATENESS OF TERMINATING MRS. BISHOP'S TENANCY.

The applicable provision of the U.S. Housing Act and HUD's regulations do not require a PHA to evict. They state only that public housing leases must provide that certain behaviors on the part of a tenant, any member of tenant's household, a guest or other person under the tenant's control *shall be cause for* eviction. Assuming that a lease violation is established, whether or not action will be taken to terminate tenancy and subsequently to evict rests within the discretion of the PHA. HUD's Public Housing Lease and Grievance regulations at 24 CFR § 966.4(l)(5) explicitly recognize this. This provsion is set forth in the Appendix.

The discretion to which these regulations refer resides with the PHA not the reviewing court.[10] The discretionary decision of the PHA should thus not be disturbed unless arbitrary, capricious, unsupported by substantial evidence, or abusive to such an extent as to amount to an error of law.[11]

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[10] See, Minneapolis Public Housing Authority v. Lor, 591 N..W.2d 700 (Minn. 1999) in which the Minnesota Supreme Court ruled that the reviewing court's function was only to determine if a lease violation had occurred and not to apply equitable principles with respect to the PHA's discretionary decision whether or not to evict based on the violation.

[11] Clark v. Alexander, 85 F.3d 146 (4th Cir. 1996) citing Ritter v. Cecil County Office of Hous. & Community Dev., 33 F.3d 323 (4th Cir. 1994). In Ritter, the court held that the decisions of a PHA with respect to its [guest] policies should, if consistent with federal housing provisions, be accorded "reasonable deference," meaning that the PHA's action should be upheld unless it is arbitrary and capricious. Id. 328. In Clark, the court accorded deference to the determinations of a PHA grievance hearing officer in an innocent tenant Section 8 termination case involving drug

The lower court concluded that the PHA was not required to consider mitigating circumstances with respect to the criminal activity of one of Mrs. Bishop's sons. "Nonetheless," the court continued, "we cannot agree that it [the housing authority] has complete discretion to evict a tenant under the circumstances presented here..." 749 A.2d 997, 1000. In so ruling, the court in effect, articulated the astounding conclusion that, by following HUD's regulation and HUD's interpretation of the statutory language published in connection with the regulation, the PHA had abused its discretion.[12]

The holding of the lower court and those of other courts refusing to evict the so-called "innocent tenant" appear to have an implicit basis in conceptions of equity and the avoidance of hardship to the tenant, rather than in recognized legal principles defining the limits of judicial review. Even so, a judicial focus in such cases only upon the perceived hardship to individual defendants represents an incomplete conception of equity, because it ignores the disastrous effect that drug-related and serious violent criminal behavior, such as that committed by Mrs. Bishop's household members, has upon other

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possession by a "family member." In so ruling, the court stated: "Plaintiff's conception of the standard and scope of review in this case would place federal courts and juries in the position of second-guessing every decision made by local housing authorities. The actual role of the courts is far more limited, even in actions brought under section 1983...." 85 F.3d 146, 153.

[12] A discussion of the central role that local housing agency discretion plays in terminations of public housing tenancy by PHAs and the role of the courts in reviewing the discretionary decisions of PHAs may be found in Maher, *Wisdom Revisited: Judicial Intervention and the Exercise of Discretion in "Strict Liability" Public Housing Evictions*, 8 J. AFFORDABLE HOUS. & COMMUNITY DEV. LAW 218 (Spring 1999). Commentary critical of interventionist approaches by the courts in the administration of housing programs by PHAs may be found in Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB LAW. 573 (1998).

public housing residents.

Excessive focus on avoiding hardship to the defendants in these cases also ignores the reality that, in almost every instance, the retention of a family in public housing whose members commit crimes has the effect of excluding an equally needy family on the waiting list whose members are not criminals. Unlike federal benefit programs such as Food Stamps, federal housing benefits have never been an "entitlement" under which all income-eligible persons have a right to housing assistance. To the contrary, it has been estimated that, nationwide, the assistance available under the federal housing programs is sufficient to serve only *25 percent* of the persons who are actually eligible for such assistance.[13] The scarce resource that represents public housing ought to be reserved for families whose members do not prey upon their neighbors. Ultimately, someone must be responsible for the criminal behavior of household members. That someone must be the person responsible for introducing those engaging in the criminal misconduct to the public housing community.

CONCLUSION

For the foregoing reasons, *amici curiae* HDLI and NAHRO respectfully urge the Court to issue a writ of certiorari to the Commonwealth Court of Pennsylvania in this cause.

Respectfully submitted,

March 19, 2001

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[13] Kingsley, *Federal Housing Assistance and Welfare reform: Uncharted Territory*, The Urban Institute, New Federalism - Issues and Options for States, Series A, No. A-19 (Dec. 1997)

APPENDIX

APPENDIX

Excerpt, HUD 1991 Public Housing Lease and Grievance Rule Preamble (56 FR 51566-67)

3.3 *Eviction For Criminal Activity*

3.3.1 Crime By Household Member

Federal law provides that certain categories of criminal activity by a public housing household member are grounds for eviction. A PHA must: "utilize leases which-... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, *engaged in by ... any member of the tenant's household* ... shall be cause for termination of tenancy ..." (U.S.H. Act, sec. 6(1)(5). 42 U.S.C. 1437d(1)(5)) {emphasis supplied}.

The U.S.H. Act statutory prohibition of criminal activity by a public housing household member was originally enacted in the Anti-Drug Abuse Act of 1988 (section 5101. Pub. L. 100-690. November 18, 1988), and was retained in the 1990 NAHA amendments which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S.H. Act). The proposed and final rule provide that the tenant must assure that members of the household (or guests, or other persons under the tenant's control) do not engage in proscribed criminal activity (§ 968.4(f)(12)(i)).

Comment by legal aid and by tenant organizations asserts that the tenant should not be required to "assure" the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household. Comment proposes various possible standards to

determine whether the tenant can be evicted for criminal behavior by household members. Comment alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything "reasonable" to control the criminal activity. Comment states that under the Constitution a tenant can only be held responsible for activity of a household member within the tenant's control.

PHA comment states that the PHA must be given discretion to evict an entire family for actions of a family member if eviction is in the best interest of other residents. If a PHA lacks clear authority to evict, the PHA may not be able to convince the family to oust a person who engages in criminal activity from the unit.

As in conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease, including obligations concerning the conduct of household members affecting the unit, the management of the housing or the welfare of other residents. By signing the lease, a tenant agrees to comply with leasehold requirements pertaining to the behavior of family members. The ability of a PHA or other landlord to enforce covenants relating to acts of unit residents (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal, or other harmful or disruptive behavior, by unit occupants, the landlord can evict - removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the continued presence of the tenant and household may result in harm to the housing or other residents, and the spread of such behavior.

The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents, warranting special mention in the law. (U.S.H. Act section 6(1)(5). 42 U.S.C. 1437d(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction). The legislative determination by the Congress rests on a reasonable judgement that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general, and will support the effective management of the housing. Since this judgement is reasonable, and promotes a legitimate public purpose, the legislation is Constitutional under the normal equal protection standard.

There is no reason of Constitutional necessity or public policy for HUD to impose - as proposed by comment - any additional restriction on when the tenancy may be terminated for criminal activity by a household member.

First, as we have already remarked, contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Second, if household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant's right to continued occupancy by the family. The standards proposed by some of the

public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Third, in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent, crime by a household member. In practice, the tenant may have encouraged or profited from the criminal activity or may have ignored or turned a blind eye. The statute and regulations are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member. (If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.)

Finally, a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.

24 CFR §§ 966.4((f)(12) and 966.4(l)(2)(ii)

(f) The Lease shall provide that the tenant shall be obligated...
(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
(A) Any criminal activity that threatens the health, safety or right of peaceful enjoyment of the PHAs public housing premises by other residents or employees of the PHA, or (B) any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(2) *Grounds for termination...*
(ii) Either of the following types of criminal activity by the tenant, any member of the tenant's household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents...."
(B) [Drug-related criminal activity]"

24 CFR § 966.4(l)(5)

Eviction for criminal activity - (i) PHA discretion to consider circumstances. In deciding whether to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit...."

Excerpt from Lease by and between Barbara Bishop and the Delaware County Housing Authority, dated January 1, 1994:

7. OBLIGATIONS OF TENANT:

The Tenant shall have the following obligations under this Lease:

....

L. Not to engage in criminal activity, including drug-related criminal activity, on or near the public housing Premises, and to have Tenant's guests, and family member or other person under Tenant's control refrain from such activity.